S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

KIM KERNS,

Plaintiff-Appellant,

v

STATE OF MICHIGAN AND MICHIGAN DEPARTMENT OF NATURAL RESOURCES,

Defendants-Appellees.

UNPUBLISHED
June 22, 2010

No. No. 289951
Roscommon Circuit Court
LC No. 07-726994-NO

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

In this hostile work environment and retaliation suit under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*, plaintiff appeals as of right the trial court's grant of defendant's motion for summary disposition under MCR 2.116(C)(10).[1] Because we conclude that there were no errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

I. BASIC FACTS AND PROCEDURAL HISTORY

Defendant Michigan Department of Natural Resources (DNR) employed plaintiff, a 42-year-old woman, as a seasonal, at-will employee from 1998 to 2005. Plaintiff worked at the South Higgins Lake State Park from 2000 to 2005. Plaintiff alleges that during the 2003, 2004, and 2005 seasons, a co-worker, Robert Turbiak, regularly made sexually offensive statements to her and other female employees, which included the words "bitch," "whore," and "cunt." Plaintiff further alleges that in 2005 Turbiak accused her of performing sexual favors for her supervisor, Eric Cowing, in return for favorable work schedules. Several of plaintiff's co-

[1] Plaintiff named both the State of Michigan and the Michigan Department of Natural Resources (DNR) in her complaint. Defendants argued that the State was an improper party because the DNR was plaintiff's employer. The trial court stated that it was granting the State's motion for summary disposition under MCR 2.116(C)(8). However, the trial court's order granting the motion did not specifically reference (C)(8). Nevertheless, because the trial court indicated that its order resolved "the last pending claim and closes the case," we read the trial court's order as applying to both defendants. For purposes of this opinion, "defendant" refers to the DNR.

workers provided notarized statements corroborating the sexual nature of these comments, but the statements only referred to comments made in 2005.

According to plaintiff, she verbally informed a park ranger and Cowing about Turbiak's conduct from 2003 to 2005. In July 2005, plaintiff and another female employee, Erin Bolen, submitted written complaints to Cowing. Both women submitted a second written complaint on August 16, 2005.[2] Cowing maintained that he was not aware of Turbiak's conduct until plaintiff made complaints in 2005. In response to these complaints, Cowing spoke with Turbiak and consulted with his human resources department. According to Cowing, his human resources department directed him to conduct an investigatory interview with Turbiak. Cowing did so, and as a result, Turbiak was issued a disciplinary action in the form of a Notice of Formal Counseling on September 4, 2005. Turbiak allegedly voluntarily resigned in September 2005 following his receipt of Formal Counseling.

Plaintiff also received a disciplinary action, allegedly because of her conduct towards a camper on July 4, 2005. When a camper lodged a complaint about inappropriate conduct by the persons at an adjacent campsite, plaintiff stated, "That's my son's campsite." The camper submitted a written complaint indicating that he was intimidated when he complained because plaintiff was an employee of the park and, presumably, had access to his personal information. The complaining camper also told a park ranger that the campers at the adjacent site received a call warning them that a ranger was coming to investigate the site and that the voice on the call sounded like plaintiff. Following the camper's complaint, plaintiff was reprimanded and suspended with pay for improperly reserving the campsite and her comment to the camper.[3] Plaintiff worked the remainder of the 2005 season. However, when plaintiff applied for the 2006 season, she was not rehired, allegedly because of this 2005 reprimand.[4]

Plaintiff sued and defendant sought summary disposition. In granting summary disposition, the trial court determined that no reasonable juror could conclude that plaintiff's conclusory assertions of misconduct were sufficient to sustain a claim of hostile work environment. The trial court also stated that no reasonable juror could conclude that plaintiff was retaliated against because she had no right to be rehired in 2006.

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[2] In addition to these complaints, plaintiff filed a charge of discrimination on July 19, 2005, with the Michigan Department of Civil Rights (MDCR) and the United States Equal Employment Opportunity Commission (EEOC) regarding Turbiak's conduct. Both complaints were dismissed or resolved based on the disciplinary action taken against Turbiak.

[3] According to Cowing, park policy prohibits employees from using their position to secure a reservation for family or friends. However, he could not point to any specific document that embodies this policy. According to plaintiff, other park employees reserved campsites using the same process.

[4] Following defendant's decision not to rehire plaintiff for the 2006 season, plaintiff filed a charge of discrimination against defendant for retaliation with the MDCR and EEOC on April 10, 2006. Additionally, plaintiff submitted an internal grievance with the MSEA on April 11, 2006, which alleged that the DNR's refusal to rehire her in 2006 was in retaliation for her sexual harassment complaints.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate under MCR 2.116(C)(10), where "the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(C)(10). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

B. HOSTILE WORK ENVIRONMENT CLAIM

Under the CRA, a plaintiff may recover under a hostile work environment claim "when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Radtke v Everett*, 442 Mich 368, 372; 501 NW2d 155 (1993). Plaintiff must prove five elements to establish a prima facie case of hostile work environment: (1) that she belonged to a protected group; (2) that she was subjected to communication or conduct on the basis of sex; (3) that she was subjected to unwelcome sexual conduct or communication; (4) that the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with her employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Id.* at 382-383.

Plaintiff has failed to establish a genuine issue of material fact as to the element of respondeat superior. To satisfy this element of her claim, plaintiff must prove that defendants had either actual notice or constructive notice of the complained of conduct. *Sheridan v Forest Hills Pub Schools*, 247 Mich App 611, 621; 637 NW2d 536 (2001). Notice of sexual harassment sufficient to impute liability to the employer exists where 'by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of the substantial probability that sexual harassment was occurring.'" *Chambers v Trettco Inc*, (*After Remand*), 244 Mich App 614, 618; 624 NW2d 543 (2001), quoting *Chambers v Trettco Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000). This usually requires offering proof that "either a recurring problem existed or a repetition of an offending incident was likely and that the employer failed to rectify the problem on adequate notice." *Chambers*, 244 Mich App at 618, citing *Radtke*, 442 Mich at 382, 395.

Plaintiff's argument that her alleged complaints to the park rangers were sufficient to put defendants on notice is without merit. *Sheridan*, 247 Mich App at 622. Plaintiff admitted in her deposition that the park rangers were not her supervisors. See *id.* at 625-626. Cowing explained that park rangers do not make decisions concerning "hiring, firing, pay, job assignments, hours, and discipline . . . ." *Id.* at 624. Hence, park rangers are not "higher management" and notice to them is not sufficient to give notice to defendants. See *id.*

Although plaintiff maintains that she continuously complained to Cowing verbally from 2003 to 2005, Cowing maintains that he did not receive notice of Turbiak's conduct until plaintiff made written complaints in 2005. At the summary disposition stage, a court is not permitted to weigh the evidence or make findings of fact. *Barnell v Taubman Co Inc*, 203 Mich App 110, 115; 512 NW2d 13 (1993). However, plaintiff testified in conclusory fashion regarding when, where, and how often the 2003 and 2004 comments were made, see *Quinto v Cross & Peters Co*, 451 Mich 358, 371; 547 NW2d 314 (1996), and provided no specifics about what she allegedly disclosed to Cowing—that is, plaintiff's testimony was insufficient to establish that Cowing knew that she was complaining about sexual harassment, as opposed to generalized complaints about a disagreeable coworker. The notarized statements given by plaintiff's co-workers also do not support plaintiff's claim that Cowing knew about Turbiak's alleged 2003 and 2004 conduct because they only reference Turbiak's comments in 2005. Plaintiff has not provided the particularity required to show that Cowing or defendant should "have been aware of the substantial probability that sexual harassment was occurring." *Chambers*, 463 Mich at 319. No reasonable jury could conclude that Cowing had the required notice of Turbiak's comments until 2005. See *Quinto*, 451 Mich at 370-371; *Chambers*, 244 Mich App at 618.

The parties do no dispute that Cowing received notice of Turbiak's 2005 misconduct. However, an employer may avoid liability "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991); see also *Chambers*, 244 Mich App at 618-619. Defendant's imputed knowledge of Turbiak's 2005 comments does not alone support a finding of respondeat superior because after each complaint made by plaintiff in 2005, Cowing increased his level of discipline for Turbiak. Following plaintiff's written complaints, Cowing took action by seeking guidance from his human resources department and eventually conducted an investigatory interview with Turbiak. Following this interview, Cowing issued Turbiak a Notice of Formal Counseling, which ultimately led Turbiak to resign. As to the 2005 incidents, plaintiff is unable to show fault on defendant's part due to Cowing's continual remedial action. See *Chambers*, 463 Mich at 312 ("The bottom line is that, in cases involving a hostile work environment claim, a plaintiff must show some *fault* on the part of the employer . . . that the employer failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment."). Because plaintiff was unable to establish the respondeat superior element of her hostile work environment claim, the trial court properly dismissed that claim.

C. RETALIATION CLAIM

Under the CRA, a plaintiff must prove the following elements to establish a prima facie case of retaliation: (1) that she engaged in a protected activity; (2) that the defendant knew of the plaintiff's involvement in protected activity; (3) that the defendant's actions adversely affected the plaintiff's employment; and (4) that the adverse employment action was causally connected to the protected activity. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005).

Here, even assuming that plaintiff is able to establish a genuine issue of material fact as to the first three elements of her retaliation claim, her retaliation claim fails because she cannot establish causation. To establish the causation element of a retaliation claim, "[a] plaintiff must

show that [her] participation in activity protected by the CRA was a 'significant factor' in the employer's adverse employment action, not just that there was a causal link between the two." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Essentially, plaintiff has the burden to show that there is nexus between the protected activity and the adverse employment action; a coincidence in time is insufficient. *Garg*, 472 Mich at 277 n 5. "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a reasonable fact-finder to infer that an action had a discriminatory or retaliatory basis." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004).

Viewing the evidence in plaintiff's favor, plaintiff can only establish a coincidence in time between defendant's refusal to rehire her and her complaints concerning Turbiak's conduct. *See Garg*, 472 Mich at 277 n 5. Plaintiff did not receive any reduction in hours or pay because of the reprimand, and she continued working for the remainder of the 2005 season. Although plaintiff was not rehired for the 2006 season, defendant rehired her co-worker, Erin Bolen, who also complained to Cowing about Turbiak's conduct. Both plaintiff and Bolen submitted two written complaints about Turbiak's conduct in 2005, but Bolen did not receive any disciplinary action. Outside of the temporal proximity between plaintiff's complaints and defendant's refusal to rehire her, plaintiff has not provided any record evidence for a reasonable person to conclude that there was an actual casual connection between these two events. See *Rymal*, 262 Mich App at 303.

Further, to the extent that plaintiff argues that the decision not to rehire her was motivated by the existence of her reprimand, which was itself improperly issued, plaintiff has failed to show that the reprimand was itself retaliatory. In support for the contention that her reprimand was really in retaliation for making sexual harassment claims, plaintiff claims that the reprimand came after she called Cowing's supervisor and complained about his failure to address the complaints and she notes the disparity between the disciplinary measure imposed against Turbiak and her. Yet plaintiff did not identify any record evidence to support her contention that Cowing's supervisor actually called Cowing before the incident involving plaintiff's son. Further, although plaintiff minimizes the nature of the conduct for which she was reprimanded, the conduct that led to her discipline could justify the specific type of reprimand that she received. Moreover, contrary to plaintiff's assertion, the ultimate discipline meted out to Turbiak and plaintiff were not so disproportional that one might infer that plaintiff was being punished for something other than her misconduct. Plaintiff has provided nothing more than speculation to show that defendant's refusal to rehire her had a retaliatory basis. *West v Gen Motors Corp*, 469 Mich 177, 188; 665 NW2d 468 (2003). The trial court properly granted summary disposition of that claim.

There were no errors warranting relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly